No. 87-850

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

HART SCHAFFNER & MARX and HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE AND MEDICAL PLAN,
Petitioners,

v.

BARBARA AND CHRISTOPHER SCHULTZ, individually and on behalf of their minor daughter, RACHAEL SCHULTZ,
Respondents.

On Writ Of Certiorari To
The United States Court Of
Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY D. ASHMAN
ASHMAN & ASSOCIATES
134 North LaSalle Street
Suite 1100
Chicago, IL 60602
(312) 782-3484

CAREY M. STEIN
HARTMARX CORPORATION
101 North Wacker Drive
Chicago, IL 60606
(312) 372-6300

Counsel of Record for Petitioners

Pandick Technologies, Inc., Chicago • (312) 236-0200

BEST AVAILABLE COPY

36pp

No.

In The
Supreme Court of the United States
October Term, 1987

HART SCHAFFNER & MARX and HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE AND MEDICAL PLAN,
Petitioners,

v.

BARBARA AND CHRISTOPHER SCHULTZ, individually and on behalf of their minor daughter, RACHAEL SCHULTZ,
Respondents.

On Writ Of Certiorari To
The United States Court Of
Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY D. ASHMAN
ASHMAN & ASSOCIATES
134 North LaSalle Street
Suite 1100
Chicago, IL 60602
(312) 782-3484

CAREY M. STEIN
HARTMARX CORPORATION
101 North Wacker Drive
Chicago, IL 60606
(312) 372-6300

Counsel of Record for Petitioners

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED

Section 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1133 ("ERISA"), requires that every employee benefit plan provide an internal administrative appeal procedure to establish review by the plan fiduciary in the event of a claim denial. The doctrine of exhaustion is judicially incorporated into ERISA cases involving a denial of benefits, requiring a claimant to conclude administrative remedies before prosecuting a federal lawsuit.

. . . .

Whether the exhaustion doctrine is defeated by the Court of Appeals' vacation of the District Court's dismissal for failure to conclude administrative review before suit.

PARTIES TO THE PROCEEDINGS

Respondents filed their Amended Complaint in the United States District Court for the Eastern District of Louisiana against three defendants: Metropolitan Life Insurance Company ("Metropolitan"); Hart Schaffner & Marx ("HSM") and Hart Schaffner & Marx Subsidiary and Affiliated Companies Group Life Insurance and Medical Plan ("the Plan"). Metropolitan was dismissed from the case with prejudice during the pendency of the appeal before the United States Court of Appeals for the Fifth Circuit. Thus, only HSM and the Plan are Petitioners in the proceedings before this Court.

Petitioner HSM is a wholly-owned subsidiary of Hartmarx Corporation. HSM is a New York corporation with numerous wholly-owned subsidiaries. In addition, HSM owns a 96 percent interest in Thorngate S.A. de C.V. HSM has numerous affiliates by virtue of

their common ownership by Hartmarx Corporation. Three such affiliates are not wholly-owned subsidiaries of Hartmarx Corporation:

(1) Country Miss, Inc., in which Hartmarx owns a 92 percent interest; (2) Organizacion Robert's S.A. de C.V., in which Hartmarx Corporation owns a minority interest; and (3) Austin Reed Group Limited in which HSM owns a minority interest.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15

APPENDICES:

A. Fifth Circuit July 22, 1987 order vacating dismissal

B. Fifth Circuit August 24, 1987 denial of petition for rehearing

C. District Court August 11, 1986 minute entry dismissing complaint

D. District Court November 12, 1986 minute entry denying motion for new trial

E. 29 U.S.C. §1001(a)

F. 29 U.S.C. §1133

TABLE OF AUTHORITIES

CASES	Page(s)
Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980)	9,12,14
Denton v. First National Bank of Waco, Texas, 765 F.2d 1295 (5th Cir. 1985)	5,9,11-15
Heckler, Secretary of Health and Human Services v. Ringer, et al., 466 U.S. 602 (1984).....	13
Kross v. Western Electric Company, Inc., 701 F.2d 1238 (7th Cir. 1983)	14
Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984)	14

STATUTES	
28 U.S.C. §1254(1)	2
29 U.S.C. §1001 et seq.....	3
29 U.S.C. §1001(a)	2,8
29 U.S.C. §1133	i,2

PUBLICATION	
14 Pens. Rep. (BNA) No. 6 at 175 (February 9, 1987)	8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not been reported, pursuant to Local Rule 47.5, and is reproduced in the Appendix hereto at pp. A-1 through A-4 ("Opinion"). The order of the Fifth Circuit denying Petitioner's Petition for Rehearing has not been reported and is reproduced in the Appendix hereto at pp. A-5 through A-6.

The minute entry of the United States District Court for the Eastern District of Louisiana dismissing Respondents' complaint and that Court's minute entry denying Respondents' Motion for New Trial have not been reported and are reproduced in the Appendix hereto at pp. A-7 through A-9 and A-10 through A-13, respectively.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit was entered on July 22, 1987 (Appendix, pp. A-1 through A-4.)

A timely Petition for Rehearing was denied on August 24, 1987 (Appendix, pp. A-5 through A-6.) This Petition for Writ of Certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §1001(a) (reproduced in the Appendix at pp. A-14 through A-16)

29 U.S.C. §1133 (reproduced in the Appendix at p. A-17

STATEMENT OF THE CASE

This action arises from Respondents' claim for medical benefits under a self-insured group medical plan, the Hart Schaffner & Marx Subsidiary and Affiliated

Companies Group Life Insurance and Medical Plan ("the Plan"). The Plan is governed by the Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq. ("ERISA").

Respondent Christopher Schultz was employed by Porter's-Stevens, then a wholly-owned subsidiary of Hart Schaffner & Marx ("HSM"), from December 28, 1981 to November 29, 1982. During his employment Mr. Schultz was a participant in the Plan.

The Schultz family suffered injuries as a result of a Pan American World Airways, Inc. ("Pan Am") jetliner crash on July 9, 1982. A few days after the accident, the Schultz family and their counsel were contacted by representatives of Pan Am and advised that Pan Am had arranged to pay all the costs associated with the medical care which the family required as a result of the accident. In total, the Schultz family received in excess of $7,321,000 from Pan Am

and/or its insurer for personal injuries and damages resulting from the crash.

On inquiry by Respondents' attorney about payment under the Plan for the medical services Respondents received as a result of the crash, HSM advised that Mr. Schultz should file a claim with the Plan for expenses not covered by Pan Am's program. Respondents' subsequent failure to provide necessary documentation compelled HSM (in November, 1984) to decline Respondents' purported claim; Respondents' attorney was specifically directed to Mr. Schultz's administrative appeal procedures available to challenge such disposition.[1]

---

1 The availability, nature and extent of such appeal procedures were known by Mr. Schultz as early as December 1981, when he actually received and reviewed the Summary Plan Description describing them. The Plan documents further specify in detail all of the administrative review processes. (See District Court minute entry at Appendix, p. A-9.)

Respondents refused to proceed with such remedies. Instead, they filed suit in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, against Metropolitan Life Insurance Company ("Metropolitan"), as administrator of the Plan, and HSM, seeking benefits payments under the Plan. Metropolitan removed the case to the United States District Court for the Eastern District of Louisiana on the grounds of diversity of citizenship. Respondents thereafter amended their complaint to assert claims under ERISA against the Plan. (Metropolitan subsequently was dismissed and is not a party hereto.)

HSM and the Plan moved for summary judgment on April 2, 1986 upon a number of grounds, one of which was Respondents' failure to exhaust internal administrative remedies. The District Court, relying on the law of the Fifth Circuit in Denton v. First

National Bank of Waco, Texas, 765 F.2d 1295 (5th Cir. 1985), dismissed the complaint, without prejudice, for Respondents' failure to exhaust the administrative appeal procedures prior to filing suit. (Appendix, pp. A-7 through A-9.) Respondents challenged the dismissal by motion styled as one for a new trial. The District Court again reviewed Respondents' arguments respecting the application of the exhaustion doctrine, and specifically determined that its earlier ruling -- dismissing for failure to exhaust administrative remedies -- was correct (Appendix, pp. A-10 through A-13).

Respondents appealed from both the District Court's dismissal of their complaint and the denial of their Motion for New Trial. In December 1986, during the pendency of the appeal, Respondents finally requested an administrative review of the denial of benefits. That review was concluded in May,

1987. In June 1987, Respondents filed a second lawsuit in the District Court raising the same claims as the first.

The Court of Appeals for the Fifth Circuit did not decide whether the District Court's dismissal for failure to exhaust was erroneous. Instead, the Court of Appeals found that, since Respondents obtained administrative review (after, not before, the subject litigation), the issue of exhaustion appeared to be moot. Nevertheless, the Court of Appeals vacated the lower court's dismissal and remanded the case for consolidation with the second lawsuit.

REASONS FOR GRANTING THE WRIT

A. The Impact of ERISA

The existence and application of ERISA without doubt has fundamentally altered the landscape of employment law. The Act has dramatically improved employees' substantive rights in a variety of tangible and other

respects. Indeed, few employment laws have so profoundly affected as many Americans: tens of millions in the workplace enjoy the safeguards and security of ERISA-governed benefits plans, and clearly many more of their non-working dependents are within the protective ambit of such plans. See, 14 Pens. Rep. (BNA) No. 6 at 175 (February 9, 1987). That employee benefits plans under ERISA are affected with a vital, national public interest; represent an important factor in inter-state commerce and the very stability and development of industrial relations, and are desirable "for the protection of the revenue of the United States, and to provide for the free flow of commerce" are so established as to constitute specific Congressional findings and declarations of policy. 29 U.S.C. §1001(a).

B. ERISA's Exhaustion Requirement, and its Defeat by the Fifth Circuit.

The exhaustion doctrine has been judicially incorporated into ERISA. Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980). Claimants under ERISA plans thus are required to exhaust administrative remedies provided thereunder before filing suit on any denial of benefits claim. The Fifth Circuit has earlier squarely adopted that mandate: "To preserve the integrity of ERISA, we hold as a matter of law that the doctrine of exhaustion of remedies is applicable to the denial of benefits by Plan trustees." Denton v. First National Bank, 765 F.2d 1295, 1297 (5th Cir. 1985).

The Fifth Circuit's Opinion in this case ignores the requirement under ERISA that a claimant exhaust his remedies before instituting a federal action. The District Court twice correctly determined that the exhaustion

doctrine was incorporated into the requirements of ERISA and is applicable to this case. The Opinion neither states nor implies that the District Court was erroneous, but indicated merely that the exhaustion issue appeared to be moot. Even so, the Court of Appeals vacated the dismissal, thus permitting Respondents to proceed on their original suit.

The requirement that Respondents adhere to the imperative of prior exhaustion has thus been disregarded. This remains true even though Respondents first failed, and then refused, to exhaust the requisite administrative remedies before, and even during, the District Court proceedings. Only after extensively litigating the point during 1985 and 1986, after receiving two adverse rulings by the District Court, and even after appealing the District Court's rulings, did

Respondents finally initiate the administrative process.

The Fifth Circuit vitiates, even abrogates, the clear and unequivocal determination recently enunciated by the Fifth Circuit, confirming that "we agree . . . that Congress, in enacting ERISA, clearly wanted potential plaintiffs to first exhaust their administrative remedies before resorting to the federal courts." Denton, 765 F.2d at 1303. (emphasis supplied). Respondents declined to proceed with such remedies, despite their actual knowledge thereof since 1981. The effect of the Opinion is: although the exhaustion doctrine applies and although claimants must meet its requirements before initiating their federal cause, if they fail to do so and the matter is raised as a defense, they still will be permitted to so exhaust - even if the federal cause already has been litigated! The rule

that a claimant must first exhaust thus becomes no rule at all, but merely a judicial preference.

Such effect is fundamentally opposed to the policies the Fifth Circuit has expressly adopted in Denton, and first articulated in Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980). That the exhaustion doctrine applies hereto is manifest. So too are the considerations underlying the doctrine, controlling here: (a) to uphold Congress' desire that ERISA trustees be responsible for their actions - not the federal courts; (b) to provide a sufficiently clear record of administrative action if litigation ensues; (c) to assure that judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, and not de novo; (d) to prevent every ERISA action from literally turning into a federal case. Denton, 765 F.2d at 1300.

Respondents cannot gainsay the mandate that claimants must conclude the administrative process prior to instituting suit. Denton, 765 F.2d at 1303. If Respondents may freely ignore the prerequisite, secure in the knowledge that they will be permitted to exhaust during, or even after, the federal litigation, the prerequisite simply vanishes. Of what merit becomes the exhaustion doctrine when it is rendered purely optional?

This Honorable Court has not hesitated in analogous cases to grant certiorari "to sort out the thorny jurisdictional problems" presented where a claimant failed to proceed through designated levels of administrative review. Heckler, Secretary of Health and Human Services v. Ringer, et al., 466 U.S. 602 (1984). This Honorable Court therein upheld the correctness of the District Court's dismissal for failure to exhaust, forbidding the premature judicial intervention allowed by the Court of Appeals. Id.

Respondents' disregard of clear, available and known Plan remedies directly contravenes the Congressional intent recognized and applied twice by the District Court. Indeed, the consequence of the Opinion, which permits Plaintiffs to litigate an ERISA action without first exhausting administrative procedures, is the undesirable alteration, or eradication, of the Denton rule earlier adopted by the Fifth Circuit.

The elimination of the exhaustion requirement as judicially incorporated into ERISA stands in dramatic contrast to, and impermissible conflict with, all of the other Circuits which have ruled upon the point.[2] To permit exhaustion after litigation

---

2 Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984) (ERISA requires claim exhaustion); Kross v. Western Electric Company, Inc., 701 F.2d 1238 (7th Cir. 1983) (well-established federal policy favors exhaustion of administrative remedies prior to bringing ERISA lawsuit in federal court) (emphasis added); Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) (Congress intended to grant authority to the courts to

shatters at once the rule and the rationale of its underlying policy considerations.

CONCLUSION

For the reasons stated above, we urge that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

Gary D. Ashman
Ashman & Associates
134 North LaSalle Street
Suite 1100
Chicago, IL 60602
(312) 782-3484

Carey M. Stein
Hartmarx Corporation
101 North Wacker Drive
23rd Floor
Chicago, IL 60606
(312) 372-6300

Counsel of Record for Petitioners

CONT'D

apply the exhaustion requirement in suits under ERISA). Denton, of course, discussed in the body, has been the law of the Fifth Circuit.

APPENDICES

TABLE OF CONTENTS

	Page
Fifth Circuit July 22, 1987 order vacating dismissal	A-1
Fifth Circuit August 24, 1987 denial of petition for rehearing	A-5
District Court August 11, 1986 minute entry dismissing complaint	A-7
District Court November 12, 1986 minute entry denying motion for new trial	A-10
29 U.S.C. §1001(a)	A-14
29 U.S.C. §1133	A-17

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3870

BARBARA AND CHRISTOPHER
SCHULTZ, Etc.,
Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant,

and

HART SCHAFFNER & MARX
(HARTMARX CORPORATION),
Defendant-Appellee.

Appeal from the United States
District Court for the Eastern
District of Louisiana

Before: Rubin, Garza and Jolly
Circuit Judges

PER CURIAM:*

The issue presented in this appeal is whether the district court abused its discretion by not excusing the plaintiffs' failure to exhaust their administrative remedies as required by the Employment

Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA"). Because this issue now appears to be moot, we vacate the dismissal of the complaint and remand this case to be consolidated with the plaintiffs' ERISA action now pending before the district court.

I

On July 9, 1982, a Pan American Air Lines jet aircraft crashed into the Schultzes' home. Pan American's insurance representative contacted the Schultzes and arranged to pay their medical costs resulting from the crash. More than one year after the accident, the Schultzes submitted claims for

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

medical expenses not paid by Pan American to Mr. Schultz' employer, Porter-Stevens, a wholly owned subsidiary of Hart, Schaffner & Marx ("HSM"). HSM denied the Schultzes' claim for over $170,000 in medical expenses. Rather than pursue their administrative appeal rights, the Schultzes filed suit in a Louisiana state court against HSM, HSM's health insurance plan ("the Plan"), and the insurer, Metropolitan Life Insurance Co.

Following removal of the case to federal court, the district court dismissed the Schultzes' complaint without prejudice for failure to exhaust their administrative remedies. The Schultzes appealed.

Pending their appeal, the Schultzes requested administrative review of their claim. Counsel informed this panel at oral argument that the Plan has recently denied the Schultzes' administrative appeal and that

the Schultzes have filed a new lawsuit in the district court raising the same claims that are presented in this case.

II

Because the Schultzes have now sought and been denied their administrative remedies, the issue of exhaustion raised in this appeal appears to be moot. In the light of these circumstances, we vacate the dismissal of the complaint and remand this case for consolidation with the Schultzes' lawsuit now pending before the district court so that all issues raised in this appeal may be presented in one case before the district court and, if necessary, heard in one appeal before this court.[1]

VACATED AND REMANDED.

---

[1]It is clear that this disposition of the case does not prejudice the Schultzes in raising before the district court the issues presented in this appeal.

Dated: July 22, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3870

BARBARA AND CHRISTOPHER
SCHULTZ, Etc.,
Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE
COMPANY,
Defendant,

and

HART SCHAFFNER & MARX
(HARTMARX CORPORATION),
Defendant-Appellee.

Appeal from the United States
District Court for the Eastern
District of Louisiana

Before: Rubin, Garza and Jolly
Circuit Judges

PER CURIAM:

IT IS ORDERED that the appellees' petition for rehearing is denied. The panel opinion vacated and remanded this appeal for consolidation with the related lawsuit now

pending before the district court; our disposition of the case in no way prejudices the parties from raising before the district court the issues they presented before our panel. Indeed, the opinion clearly holds that all issues in the appeal are preserved for resolution in one case before the district court and, if necessary, in one appeal.

Dated: August 24, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BARBARA AND CHRISTOPHER SCHULTZ, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, RACHEL SCHULTZ, Plaintiffs	)	C.A. NO. 85-2368
vs.	)	
HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE AND MEDICAL PLAN (THE PLAN), HART SCHAFFNER & MARX, Defendants.	)	MINUTE ENTRY

Before: Arceneaux, J.

Presently before the Court are numerous motions for summary judgment filed by defendants Hart, Schaffner & Marx and Hart, Schaffner & Marx Subsidiary and Affiliated Companies Group Life Insurance and Medical Plan, and plaintiffs' cross-motions for summary judgment. All motions were submitted without oral argument. Finding that plaintiffs' [sic] failed to exhaust their administrative remedies, IT IS ORDERED that their complaint is DISMISSED WITHOUT

PREJUDICE and all other motions are DISMISSED AS MOOT.

The exhaustion doctrine has been judicially incorporated into ERISA, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980). Plaintiffs justify their failure to exhaust by relying on the exception that administrative appeals would be futile, Amato; Denton v. First Nat. Bank of Waco, Texas, 765 F.2d 1295 (5th Cir. 1985). Excusing exhaustion on the grounds of futility is within the trial court's discretion, subject to review only for an abuse of that discretion, Denton. Plaintiffs' mere allegations of futility on the basis that the people to hear the appeal are hostile is clearly not sufficient to allow this Court to find the administrative appeal is futile, and it would be an abuse of discretion to do so.

Plaintiffs' claim that they should not have to exhaust their remedies because they were not notified of their appeal rights is without merit. Plaintiffs received and "looked through" the plan description containing the appeal process and are therefore aware of their appeal rights Noell v. American Design, Inc., Profit Sharing Plan, 764 F.2d 827 (11th Cir. 1985). Defendants discharge their duty to inform a plan participant by providing an accurate and thorough plan description. Genter v. Acme Scale & Supply Co., 776 F.2d 1180, 1184 (3rd Cir. 1985) citing Allen v. Atlantic Richfield Retirement Plan, 480 F. Supp. 848 (E.D. Pa. 1979).

(SIGNATURE)

Dated: August 11, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BARBARA AND CHRISTOPHER SCHULTZ, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, RACHEL SCHULTZ, Plaintiffs	)	C.A. NO. 85-2368
vs.	)	
HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE AND MEDICAL PLAN (THE PLAN), HART SCHAFFNER & MARX, Defendants.	)	MINUTE ENTRY

Before: Arceneaux, J.

ORDER AND REASONS

Currently before the Court is the motion of the plaintiffs for a new trial. For the reasons assigned below, the motion is DENIED.

BACKGROUND

On July 9, 1982, a Pan American Airlines jetliner crashed into the home of Barbara and Christopher Schultz. The tragedy took the life of one of their children and seriously injured Mrs. Schultz and their other child. Mr. Schultz was not at home at the time

disaster struck but allegedly suffered emotional disturbances as a result of the accident.

Mr. Schultz was employed by Porter-Stevens, which was a subsidiary of Hart, Schaffner & Marx Co. (HSM). Mr. Schultz was enrolled in a family health insurance plan called the Hart, Schaffner & Marx Subsidiary and Affiliated Companies Group Life Insurance and Medical Plan, which was administered by Metropolitan Life Insurance Co.

Mr. and Mrs. Schultz gave notice to Porter-Stevens and HSM that they were claiming medical benefits under the plan. HSM denied the claim and Mr. and Mrs. Schultz filed the present lawsuit.

By minute entry dated August 11, 1986, this Court dismissed the plaintiffs' claims without prejudice. The basis for the ruling was that the plaintiffs had not exhausted their extrajudicial remedies because they

failed to administratively appeal the denial of their claim.

Now the plaintiffs, by way of a motion for a new trial, ask the Court to reconsider its prior holding. The plaintiffs renew their argument that an administrative appeal would have been futile and that they should be excused from the requirement of exhaustion. To support this contention, the plaintiffs have presented evidence that their claim was not treated in the same manner as claims made by other employees and that some members of the appeal board had already denied their claim when it was first presented. In addition, they note that no employee had ever appealed a denial of benefits before.

After considering the plaintiff's [sic] arguments, this Court remains convinced that its initial decision to dismiss for failure to exhaust administrative remedies was

correct. First, even if the defendants did depart from normal procedures in handling this case, that is not reason to conclude that an appeal would be futile. Indeed, a major purpose of appeal is to correct deviations from established standards. The fact that other employees' claims were handled differently from that of the plaintiff also helps explain why no appeals had ever been taken.

Finally, the contention that members of the appeals board had already denied the plaintiffs' claims does not render the availability of an appeal futile. This Court and the plaintiffs simply cannot assume that those members of appeals board would refuse to consider whatever the plaintiffs had to say on appeal.

Accordingly, IT IS ORDERED that the motion of the plaintiffs for a new trial is DENIED.

Dated: November 12, 1986

29 U.S.C. §1001:

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the

activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect

to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. §1133:

In accordance with regulations of the Secretary, every employee benefit plan shall -

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.